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E-NOTES

"A nation must think before it acts." - Robert Strausz-Hupé

JANUARY 2015

HOW CHINA EXPLOITS A LOOPHOLE IN INTERNATIONAL LAW IN PURSUIT OF HEGEMONY IN EAST ASIA

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Who "minds the gap" in the South China Sea? The gap, that is, created in international law concerning the use of coercion or aggressive force and the right of self-defense of victim states. China exploits this gap in the international law on the use of force to compel its neighbors to accept Chinese hegemony in East Asia. By using asymmetric maritime forces – principally fishing vessels and coast guard ships – China is slowly but surely absorbing the South China Sea and East China Sea into its domain. And it does so by exploiting a loophole in international law created by the International Court of Justice (ICJ) that makes it impossible for regional states to respond effectively. This legal dimension of the international politics of the maritime disputes in East Asia is not widely understood, but it is at the core of Chinese strategy in the region.

China's Strategy

In pursuing its grand design, China must overcome resistance from three groups of antagonists. First, China has to overwhelm Japan and South Korea in the East China Sea and Yellow Sea. The plan: divide and conquer. Make sure Japan and Korea dislike each other more than they dislike China. So long as Japan and South Korea nurse historical grievances, China reaps the gain.

Second, Beijing must "Finlandize" the states surrounding the South China Sea by bringing the semi-enclosed body of water into its orbit. The plan: use a suite of carrots and sticks to bring its much weaker "frenemies" -- Vietnam, the Philippines, Malaysia, Indonesia, and Brunei -- into line. Likewise, the split in ASEAN plays to China's advantage. This strategy is by itself a powerful approach, and the first 150 years of U.S. domination and division sowed in South America provides an excellent roadmap for a gangly imperialist.

Finally, Beijing has to position itself to prevent interference by the two major maritime powers from outside the region that could stop it. Only the United States and India are positioned to check China's ambition. The plan: bring pressure to bear within the region without risking great power naval war. In particular, avoid a clear-cut incident that might trigger the U.S. security agreements with Japan, Korea, or the Philippines.[1] In pursuit of these three plans, China applies pressure across the spectrum of low-level coercion, but is careful not to cross the threshold of what is considered an "armed attack" in international law, and therefore trigger the right of individual and collective self-defense.

[1] The United States has defense agreements with five Asian states: Thailand, the Philippines, Japan, South Korea, and Australia. **Some of these defense agreements and the Taiwan Relations Act were the subject of an FPRI podcast last year, which can be accessed here: http://www.fpri.org/multimedia/2014/06/us-security-commitments-asias-changing-strategic-environment-look-japan-taiwan-korea-and-philippines-audio**

For example, beginning in 1999, China declared a seasonal "fishing ban" throughout the South China Sea, even though it has no legal competence to regulate fishing outside of its own 200 nautical mile excusive economic zone (EEZ). The farthest reaches of the Chinese ban stretch more than 1000 miles from the southern tip of Hainan Island. The fishing ban purports to manage fish stocks in the EEZs of Vietnam, the Philippines, Malaysia, Indonesia, and Brunei. Imagine if the United States began to control fishing vessels and oil platforms in Mexico's EEZ.

China also has been relentless in promoting an historic right to the islands and features, and virtually all of the ocean area, of the entire South China Sea. The world is uniformly dismayed at China's unflappable and indignant claim to "historic waters" in the South China Sea. Maritime claims are based on the rules set forth in the United Nations Convention on the Law of the Sea (LOSC), which China joined in 1996. Beijing's expansive claims, however, are based on the 9- (now 10-) dashed line that was published by the Republic of China in 1947. Although a fundamental precept of the sources of international law is that the "later in time prevails," China unabashedly touts the dash-line claim as trumping its legal obligations in the Law of the Sea Convention.[2] China has also renewed historic claims in the East China Sea over the Senkaku Islands, and in the Yellow Sea. Maritime claims constitute China's greatest "unforced error" in its *nom de guerre* as a "peacefully rising" great power.

China's Tactics

Beijing deploys a staggering variety and number of civil law enforcement and civilian commercial vessels and aircraft to press its claims and intimidate other nations. Fishing trawlers and fishery enforcement vessels are the vanguard of this policy, resulting in routine clashes with maritime security patrols in neighboring EEZs.[3] *Defense News* referred to China's swarms of fishing vessels as "proxy enforcers" that work in concert with the Chinese Coast Guard and People's Liberation Army Navy (PLAN) to "circle a disputed area of contention or create a barrier to prevent access" by the naval forces of its competitors. China Marine Surveillance ships, for example, have completely closed the entrance to the vast lagoon of Scarborough Shoal, located 125 nm West of the Philippines and inside the Philippine EEZ. Sometimes, these incidents turn deadly. In December 2011, for example, a Chinese fisherman killed a South Korean Coast Guardsman that attempted to impound the Chinese boat for illegal fishing .

Fishing vessel swarms are "rent-a-mobs" at sea, yet they pose a sensitive dilemma for other countries in the region. If the fishing vessels are challenged by neighboring states' maritime law enforcement, it appears that the fishermen are subjected to heavy-handed action. This political element also stokes righteous nationalism in China. On the other hand, if coastal states acquiesce in the actions of the fishing vessels, they cede jurisdiction and sovereign rights in their EEZs.

China first began using fishing vessels as irregular forces in the 1990s against the islands of Matsu and Jinmen to put pressure on Taiwan during periods of political tension.[4] Today China uses these tactics against Japan in the East China Sea and in the South China Sea against the Philippines, Vietnam, and Malaysia. China also has used fishing vessel swarms against Korea in the Yellow Sea. In 2009, when China confronted the USNS *Impeccable* special mission ship as it conducted military surveys 75 nm from Hainan Island, it used a flotilla composed of a naval intelligence vessel, a fisheries patrol boat, an oceanographic ship and two small cargo ships or fishing trawlers. Some of the vessels appeared to be manned by Chinese Special Forces.[5]

In order to forge stronger unity of effort within the government, Beijing combined five separate agencies into a single Coast Guard in March 2013. The "Five Dragons" were the China Coast Guard of the Public Security Border Troops, the China Maritime Safety Administration of the Ministry of Transport, the China Marine Surveillance Agency of the State Oceanic Administration, the China Fisheries Law Enforcement Command of the Ministry of Agriculture, and the maritime force of the General Administration of Customs.

Last year, China added oil rigs to its stable of paramilitary maritime forces when the China National Offshore Oil Corporation (CNOOC) rig HD 981 was positioned near the Paracel Islands in Vietnam's EEZ. The rig was guarded by a bevy of some 30 Chinese fishing vessels, paramilitary craft, and PLAN warships, until it withdrew months later. The oil rig incident was the

[2] States that have historic fishing claims may seek access from the coastal state that manages those areas under article 62 of the Law of the Sea Convention.
[3] Lyle J. Goldstein, "Chinese fisheries enforcement: Environmental and strategic implications," 40 *Marine Policy* 187 (2013).
[4] Wendell Minnick, Fishing Vessels in China Serve as Proxy Enforcers, Defense News, August 18, 2014, p. 15.
[5] Some of the "fishermen" appear to be entirely unconvincing subsistence fishermen – young, crew cut, athletic, continually at sea in Southeast Asia without tanned skin, and (!) unable to operate fishing equipment. This observation has been made to me by a former 2-star admiral in East Asia and a retired Chief of Navy from one of the states bordering the South China Sea.

lowest point in Sino-Vietnamese relations since 1979. Vietnamese forces were ejected from the Paracels by Chinese marines in a bloody 1974 invasion.

As the region awaits a ruling on the Philippine's arbitration challenge to preserve its sovereign rights in its EEZ, China's maritime misadventures in the region leverage a gaping hole in international humanitarian law created by the some of the world's top jurists in the 1986 ICJ Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America).

China "Minds the Gap" in International Law

In order for China's strategy to work, it has to slowly coerce its neighbors into accepting Beijing's hegemony, but avoid a military confrontation. China uses force through its coast guard, fishing vessels, and now oil rigs, to change the political and legal seascape in East Asia, but it studiously keeps PLAN ships over the horizon to sidestep the chance of war.

The Charter of the United Nations governs the law on the use of force in international affairs. The goal of the United Nations is to suppress "acts of aggression and other breaches of the peace."[6] While the 1928 Kellogg-Briand Pact famously outlawed the conduct of "war," and the agreement is now regarded as the height of interwar naiveté, the proscription in the U.N. Charter is even broader. Under article 2(4) of the Charter, "armed attack" (or more accurately, armed aggression or *aggression armee* in the equally authentic French translation) is unlawful. Article 2(4) also states that the threat of the use of force is as much a violation as the use of force itself.

What may states do if they suffer armed attack or armed aggression? Article 51 of the Charter recognizes the inherent right of individual and collective self-defense of all states to respond to an attack. So far so good – any illegal use of force qualifies as an armed attack, and an armed attack triggers the right of self-defense of the injured state, right? Wrong, at least according to the International Court of Justice. The decision in the 1985 ICJ Nicaragua Case opened a "gap" between an armed attack by one state and the right of self-defense by the victim state.

The case arose from the wars in Central America in the 1980s. The Sandinista regime seized power in Nicaragua in 1979, and embarked on a Marxist campaign to "liberate" Honduras, El Salvador and Costa Rica. Nicaragua supported a splinter resistance movement in El Salvador with weapons, ammunition, money, training, intelligence, command and control, and provision of border sanctuaries. With this aid, guerrilla forces wrecked El Salvador's economy and turned minority disaffection into a full-blown insurgency. The civilian population in the region suffered, and atrocities were committed on both sides.

To stabilize El Salvador, President Ronald Reagan signed National Security Decision Directive 17 on November 23, 1981. NSSD 17 authorized the CIA to build a force of Contra rebels to conduct covert action to overthrow the Sandinista regime in Nicaragua. Military assistance flowed to Honduras and El Salvador to help inoculate them against communist insurgents. The decision reflected one of the earliest programs of the Reagan Doctrine to oppose the spread of Soviet influence.

In 1984 the Government of Nicaragua brought suit against the United States before the ICJ, arguing that U.S. clandestine activities against it, including arming the Contra rebels and mining the ports of Nicaragua, were a violation of Nicaragua's sovereignty. The United States countered that U.S. operations were a lawful exercise of the inherent right of individual and collective self-defense under article 51 of the U.N. Charter. President Duarte of El Salvador said to the media on July 27, 1984:

> What I have said, from the Salvadoran standpoint, is that we have a problem of aggression by a nation called Nicaragua inside El Salvador, that these gentlemen are sending in weapons, training, people, transporting bullets and what not, and bringing all of that to El Salvador. I said that at this very minute they are using fishing boats as a disguise and are introducing weapons into El Salvador in boats at night.
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> In view of this situation, El Salvador must stop this somehow. The contras … are creating a sort of barrier that prevents the Nicaraguans from continuing to send them to El Salvador by land. What they have done instead is to send them by sea, and they are not getting them in through Monte Cristo, El Coco, and El

[6] Article 1(1), Charter of the United Nations.

Bepino.[7]

The Court rejected the U.S. and El Salvadoran claims of self-defense against an armed attack by Nicaragua. In an interim decision on the Case, the ICJ ruled by a vote of 15 to 0 that the United States should "immediately cease and refrain from any action restricting, blockading, or endangering access to Nicaraguan ports…." In its final ruling on the Merits, the ICJ held by a vote of 14 to 1 that Nicaragua's right to sovereignty may not be jeopardized by U.S. paramilitary activities. Training, arming, equipping, and supplying the Contras was a violation of international law, and not a lawful measure of collective self-defense taken by the United States and its regional allies in response to Nicaraguan aggression.

The ICJ ruled lower-level coercion or intervention, such as "the sending by or on behalf of a state of armed bands, groups, irregulars, or mercenaries" into another country constitutes an "armed attack," but the right of self-defense is triggered only if such intervention reaches the "scale and effects" or is of sufficient "gravity" tantamount to a regular invasion. There was no right to use self-defense against coercion or lower-level armed attack by irregulars or insurgents that does not rise to the threshold of gravity or scale and effects.

While both Nicaragua and the United States had funded guerrillas and engaged in acts that destabilized the region, the ICJ distinction turned on the concept of "effective control." Nicaragua was found not to have "effective control" over the insurgents trying to overthrow governments in El Salvador and Honduras, whereas the United States was deemed to exercise "effective control" over the mining of Nicaraguan harbors and the Contras.

The Court denied El Salvador the opportunity to intervene in the Case, assuring a David vs. Goliath narrative. The ICJ also accepted the Sandinista's version of the facts and ignored the armed aggression committed by Nicaragua against its neighbors.[8] Judge Schwebel, an American on the Court, issued the only dissent: "In short the Court appears to offer – quite gratuitously – a prescription for overthrow of weaker governments by predatory governments while denying potential victims … their only hope for survival." The Case represents one of the greatest pieces of international judicial malpractice in history and it should not be surprising that the decision now supports Chinese maritime encroachment (as well as Russian shenanigans in its neighbors from Georgia to Ukraine to the Baltics – but that is a story for another day).

Whether the Nicaragua Case was driven by outcome-based decision making that required a U.S. loss, or a high-minded, but misguided effort at international social justice (as I have suggested here), the result is that a gap opened between armed aggression and the right of self-defense. By using lower-levels of coercion spread over numerous small acts, none of which are sufficient to trigger the right of self-defense, aggressors are rewarded. Being politically and legally cognizant of the Nicaragua Case, China is making strategic maritime gains at the expense of its neighbors without the risk of starting a war.

Furthermore, China's strategic use of its fishing fleet as a component of "legal warfare" goes beyond exploiting the gap between the use of force and self-defense in *jus ad bellum*; it affects *jus in bello* as well. Fishing vessels likely would be used as belligerent platforms during any regional war. Some suspect China is outfitting thousands of its fishing vessels with sonar in order to integrate them into the PLAN's anti-submarine warfare operations that would have to find and sink U.S. and allied submarines.

Ever since the landmark 1900 case Paquette Habana, which arose from U.S. seizure of Cuban fishing boats in the Spanish-American war, coastal fishing vessels and fishermen are exempt from target or capture during armed conflict. By placing sonar on its fishing vessels as a force multiplier for anti-submarine operations, Beijing instantly risks these ships being regarded as lawful targets in the event of conflict. But the optics of the U.S. Navy sinking Chinese fishing vessels is made-to-order propaganda. In any event, Sam Tangredi, a prominent defense strategist wonders how many of the limited number of torpedoes is the U.S. Navy willing to expend, given the enormous number of fishing vessels.

The reaction to all this might be – so what? Countries have long used asymmetric attacks that fly under the radar. What is different now is that irregular warfare is being used as a tool of the strong to change the regional security system, rather than the weak. Furthermore, the international legal aspects of the present situation inures to China's advantage. Consequently, the

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[7] Press Conference of President Duarte, Sam Salvador Radio Cadena YSKL (in Spanish) 1735 GMT 27 July 1984 in San Salvador (July 27, 1984) reprinted in FBIS Daily Reports Latin America, 1, 4 (July 30, 1984).

[8] See, e.g. John Norton Moore, The Secret War in Central America – Sandinista Assault on World Order (1987). John Norton Moore served as a Deputy Agent of the United States at the jurisdictional phase of the case. The United States did not participate in the Merits phase of the case. Full disclosure: I earned my research doctorate under John Norton Moore at University of Virginia School of Law, where I also serve as Senior Fellow. Professor Moore has written more extensively about the legal shortcomings in the case in John Norton Moore, *Jus ad Bellum* before the International Court of Justice, 52 Virginia Journal of International Law 903, 919-935 (Summer 2012).

systemic risks are that much greater and can only be compared with the campaign by the USSR to destabilize countries during the Cold War. Who says international law doesn't matter?